Proceeding:	IN THE MATTER OF DEPLOYMENT OF WIRELINE SERVICES OFFERING A — Record 1 of 1
Applicant Name:	Bell Atlantic
Proceeding Name:	98-147 — Author Name: Lawrence W. Katz — 5000700566
Lawfirm Name:	Bell Atlantic
Contact Name:	applicant_name — Contact Email:
Address Line 1:	Legal Department
Address Line 2:	1320 North Court House Road, 8th Floor
City:	Arlington — State: VA
Zip Code:	22201 — Postal Code:
Submission Type:	ER — Submission Status: ACCEPTED — Viewing Status: UNRESTRICTED
Subject:	
DA Number:	Exparte Late Filed: — File Number:
Calendar Date Filed:	09/29/1998 11:45:32 AM — Date Disseminated: — Filed From: INTERNET
Official Date Filed:	09/29/1998 — Date Released/Denied: — Initials:
Confirmation #	1998929353132 — Date Filed:

DOCKET FILE COPY ORIGINAL

INTERNET FILING

98-147

9/29/98

No. of Copies rec'd 1

List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

BELL ATLANTIC[1] COMMENTS

Introduction and Summary

This proceeding presents a once-in-a-lifetime opportunity to promote the future health and competitiveness of the Internet. The way to do so is by fulfilling Congress's directive to remove regulatory barriers to investment and the deployment of advanced services, in both the Internet backbone itself and the new on and off ramps needed to obtain high speed access to the Internet. Yet, the rules proposed here would do the opposite. They not only would preserve existing regulatory barriers to investment, but, in many respects, actually would increase them. The unintended consequence would be to deter, rather than promote, investment in the future of the Internet generally, and to deter broad-scale deployment of advanced services to provide high speed Internet access to the mass market in particular.

But it's not too late. By modifying its proposals here to adopt a positive agenda that reduces, rather than increases, the regulatory burdens it imposes on the Internet and services

---

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company.

to access the Internet, the Commission can still speed the deployment of advanced services to all Americans and help to promote the health and competitiveness of the Internet.

First, the Commission should promote competition in the concentrated markets for Internet backbone services -- dominated by MCI Worldcom, Sprint and the spun-off MCI backbone – and for high speed connections to the Internet backbone. It can do so here by adopting targeted LATA boundary modifications to permit Bell companies to provide high speed transmission services for Internet backbones, to provide high speed connections to the nearest network access point, and to provide Intranets and Extranets to business customers – relief that will not undermine the Act's provisions governing traditional long distance services. Also, the Commission should confirm that the Act permits the Bell companies to provide advanced services that qualify as information services using long distance lines that are leased from a third party. And, to address future needs, it should establish a process for Bell companies to request other case-specific relief in unique circumstances where they can demonstrate that it will promote the public interest.

Second, the Commission should remove regulatory barriers that deter broad scale deployment to the mass market of xDSL and other advanced services for high speed access to the Internet that will compete with the cable incumbents. In particular, it should invoke its authority under section 251 to make clear that, when these mass market services are offered by the local telephone company, the equipment used to provide these advanced services, as opposed to the local loops over which they are delivered, is not subject to section 251(c)'s unbundling obligation and the advanced services themselves are not subject to that section's resale requirements. Likewise, the Commission should promptly reconfirm that Internet-

bound calls are interstate and interexchange in nature, and are not subject to the payment of reciprocal compensation -- payments that the Chairman of one new entrant recently described as a "boondoggle" that "slows down the deployment of a high-speed packet-based network."

In contrast, the current proposal merely would replace one set of regulatory barriers with another, in the form of costly and inefficient separate affiliate requirements, and should not be adopted. This proposal does nothing to promote the deployment of advanced services to the mass market. The Commission has consistently found that structural separation requirements have delayed the introduction of new services, imposed unnecessary costs on consumers and provided no greater protection than other types of safeguards. Imposing separate subsidiary requirements on advanced services would cause history to repeat itself.

Third, the Commission should not adopt proposals to impose still more collocation, unbundling and resale rules. The existing rules are already adequate to address the needs of competing carriers that wish to offer advanced services in competition with incumbent carriers. Making more rules will only unnecessarily interfere with the ability of the local telephone company to provide existing and advanced services alike, with no incremental benefit to competition.

I. INTERLATA RELIEF IS ESSENTIAL TO PROMOTE BROAD SCALE DEPLOYMENT OF ADVANCED SERVICES.

As Bell Atlantic explained in its previous filings, the Commission can best promote the deployment of advanced services in the most efficient and effective manner by granting the interLATA relief the Bell companies need to provide advanced services on an end-to-end basis. These would include any advanced services that operate at speeds higher than are

available today through ISDN offerings and all other Internet-related services. The Bell companies are in the best position to deploy these services quickly and on a broad scale.

Nonetheless, to the extent the Commission decides to grant more targeted interLATA relief, it should focus on the specific forms of relief described below that will do most to promote the growth and competitiveness of the Internet.

A. The Commission Should Exercise Its Authority To Modify LATA Boundaries In Specific Situations.

The Commission's authority to modify LATA boundaries is undisputed. The Commission has already found that "Section 3(25)(B) of the Act provides that BOCs may modify LATA boundaries, if such modifications are approved by the Commission." *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service at Various Locations*, 12 FCC Rcd. 10646, ¶ 9 (1997); Notice, ¶ 190. And the Commission has repeatedly exercised this authority to provide expanded local calling services between communities that lie on different sides of existing LATA boundaries. *Id.*

The Commission should again exercise this authority to make targeted LATA boundary changes for high-speed transmission services for Internet backbones, for high speed access to Internet network access points and for corporate Intranet and Extranet services. Modifying LATA boundaries for the purpose of operating these dedicated high capacity computer-to-computer links is more limited than LATA boundary relief the Commission has routinely granted for traditional telecommunications services.

In fact, modifying LATA boundaries for advanced services is consistent with precedent under the AT&T consent decree, or "MFJ." Prior to 1996, the district court

approved numerous modifications of the LATA boundaries where the relief enabled the provision of new services like wireless and SS7 services over larger geographic areas.[2] That is exactly the type of relief the Commission contemplates here. As a result, there is nothing radical or new about the Commission's use of LATA boundary modification authority to provide targeted relief for advanced services.

Moreover, granting the targeted relief requested here will not undermine the core provisions of section 271, which Congress wrote with the traditional long distance market in mind. Indeed, because the targeted relief described here will not provide an entree into the general long distance market, the incentives to break into that market will remain intact. Consequently, because the Bell companies would still need the Commission's approval to enter the $80 billion general long distance market, this relief would not diminish in any material way their incentives to meet the Act's section 271 requirements.

1. High Speed transmission services for Internet backbones. The Internet backbone is much like the Washington beltway – it is frequently jammed with traffic and is getting worse

---

[2] Modifications of LATA boundaries were granted under the MFJ for specified purposes, particularly to make possible the speedier development of new telecommunications services or increased competition. *E.g., United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Apr. 28, 1995) (wireless services); *United States v. Western Elec. Co.*, 1986-1 Trade Cas. &67,148 (paging services); *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Feb. 26, 1986) (paging services); *United States v. Western Elec. Co.*, 1987-1Trade Cas. (CCH) &67,452 (cellular services); *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Feb. 18, 1993) (cellular services); *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Sept. 20, 1994) (video and audio programming by satellite and other means); *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Sept. 21, 1993) (cable service); *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Oct. 24, 1994) (same); *see also United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Nov. 14, 1988); *United States v. Western Elec. Co.*, No. 82-0192 (Feb. 15, 1991); *United States v. Western Elec. Co.*, No. 82-0192 (May 11, 1994); *United States v. Western Elec. Co.*, 604 F. Supp. 256, 261 (D.D.C. 1984).

as more people try to get on it.[3] Moreover, as this Commission and both domestic and international antitrust authorities have recognized, the Internet backbone market today is highly concentrated, and is dominated by the big-three backbone providers – MCI Worldcom, Sprint, and the spun-off MCI backbone.[4] The Commission can go a long way toward addressing these problems if it adopts here a LATA boundary modification to permit Bell companies to provide transmission services for Internet backbones without regard to geographic boundaries, and, by doing so, introduce a number of strong new suppliers to the Internet backbone market.

2. High speed access to the nearest network access point. High speed access to Internet backbones is not available everywhere, and many areas have been bypassed by the three carriers that dominate the Internet backbones.[5] Even where high speed access to the

---

[3] *See, e.g., Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, White Paper Supporting Petition, CC Docket No. 98-11 (Filed Jan. 26, 1998); J. Dvorak, *Breaking Up the Internet Logjam*, PC Magazine, Apr. 8, 1997; Press Release, *DSL and Cable Modems Will Not Solve Internet Performance Problems, According to Keynote Systems; Internet Speed Limit Impedes Full Potential of High-Speed Internet Access Over 'The Last Mile,'* www.keynote.com/news/announcements/pr021398.html.

[4] *See, e.g.,* Antitrust Division Press Release, *Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell its Internet Business* (July 15, 1998) (Assistant U.S. Attorney General Joel Klein noted that "[t]he merger as originally proposed would have given WorldCom/MCI a significant proportion of the nation's Internet traffic, giving the company the ability to cut off or reduce the quality of Internet services that it provided to its rivals"); Keynote Systems and Boardwatch Magazine, Keynote/Boardwatch Internet Backbone Index, Nov. 11, 1997, http://www.keynote.com/measures/backbones/backbones.html.

[5] *See, e.g.,* Comments from The Rural Policy Research Institute, CC Docket 98-146 (Sept. 14, 1998); Comments of U S West Communications, Inc., CC Dkt. 98-146, pp. 15-18 (Sept. 14, 1998); Bell Atlantic 706 Petition, CC Docket 98-11 at 14 (Jan. 26, 1998); Bell Atlantic 706 Reply, CC Docket 98-11 at 10-13 (May 6, 1998).

backbones is available, moreover, there typically are a limited number of facilities providers to choose between.

In order to have competing high speed connections to Internet backbones available on a broad scale, the Commission should modify the LATA boundaries that currently preclude Bell companies from providing that access. Specifically, it should approve a LATA boundary modification to permit Bell companies to carry traffic to the nearest network access point, or "NAP," whether public or private.

The benefits of granting this relief will be especially pronounced in rural or other areas that existing providers have largely ignored. As WorldCom and others have noted, they do not find it economic to serve places like West Virginia (and no doubt many other areas) with their own facilities. *See* WorldCom West Virginia Comments, CC Docket No. 98-11 at 3 (Aug. 10, 1998). The benefits will not, however, be limited to those areas. Even in those areas where existing providers do operate, competition is limited and options are few. As a result, the Commission should not continue to restrict the local Bell companies from solving the bandwidth famine problems in reliance on claims by opponents that "competition" from companies that have little incentive to compete will solve all problems.

As with relief for the backbones themselves, this targeted relief would not diminish Bell company incentives to meet 271 requirements. The fact remains that Bell companies still will need long distance relief to enter the general long distance market and to serve their existing customer base with a full range of local and long distance voice and data services other than these limited Internet services. As a result, limited LATA boundary relief that

enables a Bell company to provide a short high speed connection to the nearest public or private NAP will not in any way make section 271 relief less attractive or necessary.

3. Intranets and Extranets. The Commission also should permit Bell companies to provide advanced Intranet or Extranet services to businesses, universities or health care providers. These private corporate (and institutional) networks for advanced services are not even part of the public telephone network that Congress had in mind in enacting the 1996 Act. They can be accessed only by the corporation itself or external partners chosen by the corporation. They cannot be used to communicate with the public at large. To the extent Intranets and Extranets are even subject to LATA boundaries, there are sound reasons for modifying those boundaries.

Most importantly, granting relief would introduce strong new competitors into this market to bid against the existing providers, and provide the benefits that new competition brings to any markets – the potential for more competitive prices and more innovative service offerings. Moreover, because of the enormous potential for these private networks to improve the efficiency and productivity of their users, introducing added competition is especially beneficial because of the flow-through effect on the economy as a whole and on the critical education and health care sectors of the economy in particular.

Granting the Bell companies limited interLATA relief to provide Intranet/Extranet services would not diminish the need or desire for Bell companies to obtain section 271 relief. Bell Atlantic's share of the market for these advanced services (about $40 million in 1998) pales in comparison to the $80 billion market for general long distance services and are used by only a small portion of Bell company customers. Targeted relief for Intranets and

Extranets will not detract one iota from Bell Atlantic's need to be able to offer the full range of services – local, toll and long distance – for its tens of millions of customers so that it does not lose them to competitors that can and do offer all of these services.

The dividing line between private networks such as Intranets and Extranets and the vast bulk of interLATA services is well-defined and enforceable. Intranets and Extranets are defined by their strict limitation on who can access them – in the case of Intranets, only a corporation's employees, and in the case of Extranets, only the individuals chosen by the company.

4. Additional case-specific relief. Because the telecommunications universe is not a static one, the Commission should establish an expedited process for Bell companies to request case-specific relief in the future in response to unique circumstances.[6] Where the Bell company can show, on a case-specific basis, that relief is in the public interest because of unique circumstances, and that relief will not undermine the provisions of section 271, there is no reason for the Commission to maintain the restrictions.

B. The Commission Should Confirm That Incumbent Carriers May Provide Information Services On A National And International Basis And Do Not Need InterLATA Authority To Provide These Services.

In its Notice here (at ¶ 35), the Commission suggests that all "advanced services are telecommunications services," and, therefore, that all advanced services are subject to section

[6] Specifically, the process should be modeled on the Commission's current approach for handling LATA boundary modification requests, but subject to uniform deadlines for pleadings and a decision -- with comments and replies due on a 15 and 10 day cycle, and a decision within 60 days of filing.

251's unbundling and resale obligations and to section 271's restriction on the provision of in-region interLATA services. This is incorrect.

In reality, while some advanced services, such as xDSL transmission services, may qualify as telecommunications services under the Act, others that involve the generation or storage of information content or protocol conversions clearly do not. Rather, these latter services constitute information services under the express definitions in the Act and the Commission's own rules – which the Commission repeatedly has emphasized is a separate and distinct category from telecommunications services.

Moreover, because telecommunications and information services are separate categories, the Commission itself previously recognized that information services are not subject to the Act's unbundling or resale requirements.[7] By the same token, and as the Commission's recent *Report to Congress* on universal service issues makes clear, information services also are not subject to the Act's restrictions on providing in-region interLATA services so long as the Bell company obtains the transmission services that are used to provide the information services from a third party.

1. When A Bell Company Provides InterLATA Information Service Using Transmission Services Obtained From Others, It Is Not Providing InterLATA Services Under Section 271.

Section 271(a) states that a Bell company may not "provide interLATA services" originating in its region except as permitted under that section. The scope of this restriction is

---

[7] *Federal State Board on Universal Service. Report to Congress.* 13 FCC Rcd 11501, ¶ 69, n.138 (1998) ("*Report to Congress*"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16170 (1996) ("*Local Competition Order*").

established by the express definition of "interLATA services," which means telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21) (emphasis added). And under the express terms of the Act, "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (emphasis added). In contrast, the Act defines information services as the mutually exclusive set of services that do involve a change in the form or content: "[t]he term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing." 47 U.S.C. § 153(20).

Based upon that express language of the Act, as well as the supporting legislative history,[8] the Commission has correctly concluded that telecommunications and information services are distinct, non-overlapping sets. In fact, as the Commission recently reiterated in its *Report to Congress*, it has conclusively established that a provider of information services is not "providing telecommunications" when it acquires the necessarily-included transmission service from a third party and bundles it into an information service offered at a single price:[9]

---

[8] *See Report to Congress* ¶ 44, n.94 (Apr. 10, 1998) ("we have no reason to question that various statements in [the Senate] Report apply to the 1996 Act, as adopted by Congress: that the telecommunications definition 'excludes . . . information services'; that information service providers 'do not "provide" telecommunications services' . . . ."), *see also id.* at ¶ 69 n.138 ("[T]he 1996 Act built on the Commission's deregulatory actions in *Computer II*, so that 'telecommunications' and 'information service' are mutually exclusive categories").

[9] "Necessarily included" because, by definition, an "information service" is provided "via telecommunications." 47 U.S.C. § 153(20).

After careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive. Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.' By contrast, when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so. *Universal Service Report to Congress* & 39 (footnote omitted).[10]

As the Commission has explained, under these circumstances, an information service provider is using telecommunications, not providing it. It is the company engaged in the provision of transmission capacity to information service providers that is providing telecommunications:

> [A]n entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not "change . . . the form and content" of the information. When an entity offers subscribers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or

---

[10] *See also Report to Congress* at ¶ 40 ("the language Congress used to define 'telecommunications' . . . specifies that the transmission be 'without change in the form or content of the information as sent and received.' It appears that the purpose of these words is to ensure that an entity is not deemed to be providing 'telecommunications,' notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information."); *id.* at ¶ 33 ("the Commission ruled in the *Universal Service Order* that entities providing enhanced or information services are not thereby providing 'telecommunications service.'"); *id.* at ¶ 33 n. 51 ("[t]he Commission in the *Non-Accounting Safeguards Order* treated the category of information services as distinct from telecommunications").

> making available information via telecommunications," it does not provide telecommunications; it is using telecommunications.

Id. at ¶ 41 (footnotes omitted) (emphasis added).[11]

It is, in short, now unmistakably clear that when a Bell company provides an information service, it is not "providing telecommunications," at least so long as it uses leased transmission facilities that are bundled into its information service for a single price.[12] Under the express definition of "interLATA services," then, such a provider of an information service is not providing an "interLATA service" covered by Section 271.[13]

Moreover, while the express statutory definitions are dispositive, the Act's carefully drawn distinction between telecommunications and information services is further reinforced by Section 272, which lays out the circumstances in which various Bell company services must be provided through a separate affiliate. In fact, Section 272 consistently affords separate

---

[11] *See Report to Congress* at ¶ 43 ("The Senate Report stated in unambiguous terms that its definition of telecommunications 'excludes those services . . . that are defined as information services.' Information service providers, the Report explained, "do not 'provide' telecommunications services; they are users of telecommunications services.") (quoting *Senate Report* [S. Rep. No. 23. 104th Cong., 1st Sess. (1995)] at 18, 28) (footnotes omitted) (emphasis added).

[12] The Commission reserved for further proceedings the different situation "where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service." *Id.* at ¶ 69. "One could argue that in such a case the Internet service provider is furnishing raw transmission capacity to itself." *Id.* (footnote 138 attached, stating: "When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications.").

[13] The situation that the Commission distinguished and reserved was limited to an information service provider that "owns" its transmission facilities. *Id.* at ¶ 69. The general Commission ruling that an information service provider does not provide telecommunications was phrased repeatedly to cover "leased lines," without further narrowing based on forms of payment. *Id.* at ¶ 67.

treatment to "information services" and to "telecommunications services" – both in the provisions that impose a separate affiliate requirement (*see* § 272(a)(2)(B) & (C)), and in the provision that establishes different sunset requirements for those services (*see* § 272(f)(1) & (2)). And it is only the separate provisions that address "telecommunications services" that make any mention of Section 271, or that tie the sunset to the date on which a Bell company is "authorized to provide interLATA telecommunications services under Section 271(d)." *See* § 272(a)(2)(C) & (f)(1). In contrast, the sunset date for interLATA information services is keyed to passage of the Act, *see* § 272(f)(2), further confirming that Congress anticipated that these services, unlike interLATA telecommunications, could be provided beginning immediately upon enactment.

2. The Commission's *Non-Accounting Safeguards Order* Does Not Require A Different Result.

In its *Non-Accounting Safeguards Order*, the Commission concluded that at least some types of "interLATA information services" fall within the definition of "interLATA services." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272.* 11 FCC Rcd 21905 at ¶56 (1996) ("*Non-Accounting Safeguards Order*"). As the Commission since made clear, this conclusion does not apply where transmission services are obtained from third parties for use in providing the information service. Under these circumstances, nothing in the *Non-Accounting Safeguards Order* requires a different result.

First, the Commission said: "interLATA information services are provided via interLATA telecommunications transmissions and, accordingly, fall within the definition of 'interLATA service.'" *Id.* But as the Commission has now thoroughly explained, the "accordingly" does not follow at all where the transmission services are obtained from others. Under these circumstances, the fact that information services are provided "via telecommunications" means that providers of such services use telecommunications. It does not mean that they provide telecommunications – as expressly required by the statutory definition of "interLATA services."

Second, the Commission said: "we believe that it is a more natural, common-sense reading of 'interLATA services' to interpret it to include both telecommunications services and information services." *Non-Accounting Safeguards Order* at ¶ 56. But it is well settled that a supposedly "natural, common-sense" meaning does not control when statutory terms are given express statutory definition establishing precisely what they mean.[14] And here, the

---

[14] As the Commission itself has recognized, the express statutory definition are controlling in interpreting the scope of the Act's provisions. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, FCC 98-188, ¶ 33 (rel. Aug. 7, 1998) (footnote 49 citing 47 U.S.C. § 153) ("[t]he specific obligations of the 1996 Act depend on application of the statutory categories established in the Act's definitions section."); *Universal Service Report to Congress* ¶ 21 ("All of the specific mandates of the 1996 Act depend on application of the statutory categories established in the definitions section."). And the law is settled that such definitions – when they are phrased, as these are, to state what a term "means" rather than what it "includes" – control even over what might otherwise be a "natural" or "ordinary" meaning. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995); *FDIC v. Meyer*, 510 U.S. 471 (1994); *Smith v. United States*, 508 U.S. 223 (1993); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (quoting C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp.1982)); *American Mining Congress v. EPA*, 824 F.2d 1177, 1189 (D.C.Cir. 1987); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir.1982).

express statutory terms make clear that the term "interLATA services" does not include information services that use transmission services leased from others.

Third, the Commission found support in the fact that Section 272(a)(2) uses the language "interLATA telecommunications services" and contrasts it with "interLATA information services." The inference the Commission draws from this fact is backwards. In reality, section 272(a)(2) naturally supports the distinctness of information services and telecommunications. And the most natural inference from the provision's use of "interLATA telecommunications services," rather than "interLATA services," is that it was chosen to

highlight the contrast with "interLATA information services." And this understanding accords with various aspects of Section 272 that strongly confirm – as the Act's express definitions provide – that Section 271 covers only telecommunications, not information services.

Fourth, one additional argument that was made in the *Non-Accounting Safeguards Proceeding* -- but that the Commission did not adopt -- was that section 271(g)'s list of incidental interLATA services that the Bell companies may provide somehow shows that Congress intended for information services to be within the scope of interLATA services. This is so, the argument goes, because some of the incidental interLATA services permitted by that section qualify as information services and would not have been included if the Bell companies already could provide information services across LATA boundaries.

This argument makes nonsense of the express limitations imposed by the definition of interLATA services, and it is axiomatic that the after-included provisions of section 271(g) must, if possible, be construed to be in harmony, rather than in conflict, with the express definitional terms. Here, that harmonious interpretation is readily apparent. As an initial matter, many of the incidental services covered by Section 271(g) – unlike information services – properly can be classified as telecommunications services.[15] But even aside from those 271(g) items that can be wholly telecommunications, the circumstance contemplated in

---

[15] The Commission itself has recognized that "[f]or the most part, the incidental interLATA services . . . are telecommunications services." *Non-Accounting Safeguards Order* ¶ 94 (footnote omitted). For example, network signaling (items (5), (6)) is expressly excluded from the definition of "information services" (47 U.S.C. § 153(20)). Similarly, wireless services (item (3)) are undoubtedly telecommunications. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 780 (1997) ("*Universal Service Order*").

Section 271(g) is the provision of truly "*incidental*" telecommunications: when the transmission component of a non-telecommunications service, including an information service (which are by definition offered "via telecommunications"), is treated as a separate service.[16] In that situation, when the Bell company uses its own facilities for the transmission, whether that offering is the self-provision of a separate transmission service, *i.e.*, telecommunications – is precisely the issue that the Commission left open in its *Report to Congress*. And as the legislative history confirms, it is precisely the circumstance where a Bell company is providing telecommunications that is *incidental* to one of the itemized services where section 271(g) applies.[17] In contrast, it does not apply, because it is not needed, when a Bell company leases transmission from a third party as an input for use in providing an information service.

---

[16] At least since *Computer II*, 77 FCC 2d 384, ¶229 (1980), the Bell operating companies have been required to treat their own facilities-based transmission as distinct from the enhanced services into which it is an input, and to make the transmission available separately to other enhanced service providers on non-discriminatory terms. *See Frame Relay Order*, 10 FCC Rcd 13717, ¶¶ 13, 41 (1995) ("carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions").

[17] As the Conference Report explains, "section 271(b)(1) requires a BOC to obtain Commission authorization prior to offering interLATA services within its region unless those services are . . . 'incidental' to the provision of another service, as defined in new section 271(g), in which case, the interLATA service may be offered after the date of enactment." H.R. 458, 104th Cong. 2d Sess., at 147 (emphasis added).

II. THE COMMISSION SHOULD REMOVE REGULATORY BARRIERS TO BROAD SCALE DEPLOYMENT OF ADVANCED SERVICES TO THE MASS MARKET BY LOCAL TELEPHONE COMPANIES.

In order to promote the broad scale deployment to the mass market of the xDSL and other advanced services that can provide high speed access to the Internet in competition with the cable incumbents, the Commission should remove existing regulatory barriers to investment and deployment of these advanced service by local telephone companies. In particular, the Commission should invoke its authority under section 251 of the Act to make clear that when advanced mass market services are offered by the local telephone company, the unbundling and resale obligations in section 251(c) do not apply. It also should make clear that Internet-bound calls delivered over these advanced services are not subject to the payment of reciprocal compensation.

In contrast, imposing a separate affiliate requirement as the price to avoid existing requirements will only substitute one set of regulatory barriers for another. This will do nothing to promote the deployment of advanced services, but instead will impose unnecessary costs and inefficiencies that will delay broad scale deployment and increase costs to consumers.

A. The Commission Should Remove Unbundling And Resale Obligations That Deter Broad Scale Deployment In An Efficient Manner Through The Local Telephone Company.

As is addressed further below, by far the most efficient way for incumbent carriers to deploy advanced services – particularly to the mass market – is through the operating local telephone companies. This allows the telephone companies to draw upon their existing work

forces, expertise, and operating and billing systems to deploy and operate these advanced services, and to avoid the significant duplication of costs that would be incurred if the services were to be deployed through a separate entity. Significantly, the competitors of the telephone companies, including both the cable incumbents and other providers, already are free to offer these services on an efficient, integrated basis.

As the Commission itself has recognized, however, the unbundling and resale obligations imposed on the traditional telecommunications services significantly undermine the incentives of incumbent carriers to make the enormous investments necessary to broadly deploy advanced services, especially to the mass market. They do so by forcing incumbent carriers to make their investments in advanced service capabilities available to competitors at cost and by allowing competitors to enter the market by piggybacking on the investment made by the incumbent with no risk to themselves. The result is to largely deprive the incumbent carriers of the benefits of undertaking the inherently risky investment to deploy these facilities, and to thereby undermine their incentives to make the investment necessary for broad scale deployment in the first place.

To remove this deterrent, the Commission should invoke its express authority under Section 251 to make clear that the unbundling and resale obligations do not apply to these advanced services when they are offered through the local telephone company. For example, under Section 251(d)(2), equipment and facilities used to provide advanced services do <u>not</u> need to be unbundled where failure to provide a competitor with access to those elements will not "impair" its ability to provide services (or where access to proprietary elements is not "necessary"). But the equipment at issue here is in no sense an embedded "bottleneck" facility

that competitors need access to. On the contrary, it is equipment that is being deployed now for the first time, and that competitors themselves can obtain from the same sources as the incumbent and deploy on the same basis. Indeed, the Commission itself has implicitly recognized as much, since it has concluded that competitors do not need access to this equipment when it is deployed in a separate affiliate.

Likewise, Section 251(c)(4) creates a duty only to not impose "unreasonable" conditions or limitations on the resale of telecommunications services, and assigns the Commission a role in determining what is and is not reasonable. But this duty must be balanced against the Congressional directive to promote deployment of advanced services. And given this mandate, it is certainly "reasonable" to restrict the availability of these services to competitors at a wholesale discount -- precisely because subjecting these services to that obligation would interfere with the fulfillment of another express Congressional directive.

Finally, the Commission should make clear, once and for all, that Internet-bound calls delivered over these advanced services are not subject to the payment of so-called "reciprocal compensation." As one analyst has explained, payment of reciprocal compensation on this traffic actually deters investment in competing facilities because it has the "perverse effect of turning customers from assets to liabilities." *See* S. Cleland, "Reciprocal Comp For Internet Traffic—Gravy train Running Out of Track," Legg Mason Research Technology Team (June 24, 1998). Moreover, as the Chairman of Covad, a competing provider of advanced services recently explained, the effect of the reciprocal compensation "boondogle" is to "slow down the deployment of a high-speed packet-based network." *See* Transcript, Economic Stategy Institute Forum on Section 706 (Sept. 16, 1998); Comm. Daily, Sept. 17, 1998 at 4. This is

yet another reason why the Commission needs to resolve this issue quickly and reaffirm that Internet traffic isn't eligible for reciprocal compensation.

B. In Contrast, Adopting A Separate Subsidiary Proposal Will Increase Costs and Delay Wide Scale Deployment To The Mass Market.

As history conclusively shows, imposing a separate affiliate structure as the price to deploy new services free of existing regulatory constraints merely substitutes a whole new set of regulatory barriers that will increase costs and delay deployment to the mass market. Nothing has changed to make separate subsidiaries any more economically rational for regulating the emerging advanced services of today. To the contrary, the experience of enhanced services counsels that consumer welfare is enhanced by integrated telephone company provision of new services.

First, separate subsidiary requirements are economically inefficient. The Commission itself has noted in other contexts that structure separation requirements "can . . . decrease efficiency . . ." *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, 98 F.C.C.2d 1191, 1198 (1984). Eminent economist Robert Crandall has written that separate subsidiary "requirements discourage the most efficient use of facilities, resulting in higher costs and, therefore, higher prices." Affidavit of Robert W. Crandall, Comments of Bell Atlantic, CC Docket 96-21, at 9 (March 13, 1996) ("Crandall Affidavit"). These requirements can increase service costs up to 30%. Affidavit of Robert W. Crandall, Bell Atlantic Reply Comments, CC Docket No. 96-61 at ¶7 (May 3, 1996) (citing 1995 study by Professors Hausman and Tardiff).

The Commission's experience with separate subsidiaries for voice messaging services shows the costs to be staggering. Dr. Jerry A. Hausman has calculated that the requirement

delayed the introduction of network-based voice messaging services by five to seven years and caused a public welfare loss of $1.27 billion. Bell Atlantic Comments, CC Docket No. 95-20, Attachment A (filed April 7, 1995). In addition, Bell Atlantic demonstrated that imposing a separate subsidiary requirement on its voice messaging service would cost at least $100 million. Bell Atlantic Comments, CC Docket No. 95-20 and 98-10 at 8 (filed March 27, 1998). Similarly, US West estimated the cost of structural separation for voice mail to be between $59 million and $91 million. US West Comments, CC Docket Nos. 95-20 and 98-10, attached economic study at 3 (April 4, 1998).

Second, and more importantly, separate subsidiary obligations are actually anticompetitive and hurt consumers by artificially imposing unnecessary costs on one of the competitors. Unlike competing carriers that offer all traditional telephone services and advanced services on an integrated basis through a single company, incumbent carriers would have to operate two separate companies to accomplish the same result. A competing carrier can use the same technician, the same ordering and billing systems, and the same facilities to provide its both its traditional and advanced services. Bell Atlantic, on the other hand, would have to have two of everything, at a prohibitive cost penalty.

Third, a separate affiliate requirement not only imposes additional costs, but it also delays deployment of advanced services to the mass market – depriving consumers of the advanced services they want. A separate affiliate would have to start from scratch, hiring its own construction force, marketing organization, billing systems and the like. All of this takes time, especially for any broad scale deployment of advanced services. Voice messaging

services are a prime example. It was only after the Commission lifted its structural separation requirements that these services became available to the mass market. Crandall Affidavit at 8.

Fourth, the Commission has found that non-structural safeguards are effective in any event. Actual market experience proves the point. Since divestiture, Bell companies have been permitted to offer a variety of services and products that interconnect with the local network – ranging from enhanced services and customer premises equipment to corridor interLATA services – through the telephone companies rather than separate subsidiaries. In every case, the result has been an increase in overall output and lower prices, with no harm to competition. In fact, the enhanced (information) services and CPE markets are highly competitive.

Corridor InterLATA Service. Bell Atlantic routinely has provided interLATA services in the northern New Jersey-New York and southern New Jersey-Philadelphia corridors for over ten years without structurally separating its retail and wholesale operations and without anticompetitive consequences. *See United States v. Western Elec. Co.*, 569 F. Supp. 990, 1018-19, 1023 (D.D.C. 1983). According to AT&T's own estimate, Bell Atlantic's prices are up to one-third lower than those of the Big Three interexchange carriers. AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration, *AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules,* CCB/CPD Docket No. 96-26 Attachment A (Oct. 23, 1996) ("AT&T Waiver Petition"). Yet, after twelve years, Bell Atlantic has not dominated the market — it has less than 20 percent of the corridor market. *See* Declaration of Robert W. Crandall, ¶ 10, attached to Bell Atlantic Petition ("Petition"), DA 95-1666 (filed July 7, 1995); *see also*, Declaration of Robin A. Lewis-Ivy attached to Petition. When